

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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:  
UMB BANK, N.A., :  
:  
Plaintiff, : 15-CV-08725 (GBD)  
:  
v. : November 16, 2017  
:  
SANOFI, : 500 Pearl Street  
:  
Defendant. : New York, New York  
:  
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TRANSCRIPT OF CIVIL CAUSE FOR DISCOVERY CONFERENCE  
BEFORE THE HONORABLE ROBERT W. LEHRBURGER  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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For the Defendant: JOHN NEUWIRTH, ESQ.  
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1 THE COURT: .... name for the record.

2 MR. GILMAN: For plaintiff and the trustee and UMB  
3 Bank as trustee, Charles Gilman from Cahill Gordon & Reindel.

4 MR. WEISS: For plaintiff also from Cahill Gordon &  
5 Reindel, Michael B. Weiss.

6 MR. NEUWIRTH: Good morning, Your Honor. For  
7 defendant Sanofi, John Neuwirth from Weil Gotshal & Manges.

8 MS. VENEZIA: Also for defendants Stefania Venezia  
9 from Weil.

10 THE COURT: Thank you for being here. You may be  
11 seated. We are here in the case of UMB Bank, N.A. v. Sanofi,  
12 15-CV-8725.

13 I want to make sure we're all on the same page about  
14 today. First of all, you may be aware that Judge Francis  
15 retired recently and after a very long distinguished career  
16 and I have stepped into his place for some of his cases,  
17 including this one.

18 So I've had the benefit of several communications  
19 from you as well as some briefing which I've read and I want  
20 to make sure we're on the same page about what we're  
21 discussing today and obviously if I don't hit everything you  
22 want to talk about we can add in further issues.

23 But the three things I have noted are the joint  
24 request to amend the scheduling order. Second, the trustee's  
25 motion to compel production of certain documents which has

1 been fully briefed; and third, the trustee's motion to compel  
2 and defendant Sanofi's motion to quash certain non party  
3 subpoenas for which I received assorted letters, and I would  
4 like to ask the parties if they are satisfied that the court  
5 can make a ruling on that issue based on what's been submitted  
6 along with any argument I hear today.

7           So first, let me just ask that question before we  
8 get on to the full agenda.

9           MR. GILMAN: Your Honor, I think you misspoke  
10 certainly on the last point. It is the trustee's motion to  
11 quash --

12           THE COURT: Yes, correct.

13           MR. GILMAN: -- for protection against 26 non party  
14 subpoenas issued by the defendant Sanofi.

15           With respect to three items, Your Honor, we are of  
16 course jointly prepared to speak to the case management order.  
17 We jointly submitted it for the court's review and approval.

18           Second, we had in fact fully briefed the trustee's  
19 motion to compel a discrete collection of core business  
20 records. We refer to them as the post July 2016 documents.  
21 Both sides have completely briefed that. We are prepared to  
22 argue it or submit on the papers as the court would wish.

23           On the third matter, the 26 subpoenas, as reflected  
24 in my letter which was in response to Mr. Neuwirth's, the  
25 proposal -- and it appears on the third to the last paragraph

1 on Page 3 of his letter, was new and it was not communicated  
2 at any time during the meet and confer. We have not had an  
3 opportunity to confer with all 26 holders on that proposal.  
4 We would be prepared to do so but if Mr. Neuwirth as he says  
5 in his letter has declared an impasse we are equally satisfied  
6 in simply resting on the papers that were submitted to Judge  
7 Francis. We submitted a letter brief pursuant to his  
8 chamber's rules. Mr. Neuwirth responded. We replied. All of  
9 those ECF citations are reflected in my letter to Your Honor  
10 of Monday I think it was, or Tuesday. But we can rest on the  
11 papers on that as well if you wish.

12 THE COURT: I've read all those by the way. I have  
13 read most of the record that pertains to the issues today  
14 including previous rulings by Judge Francis.

15 We're skipping ahead just a little bit but on this  
16 issue of the subpoenas one of my questions was going to be  
17 whether counsel thinks there's still an impasse in light of  
18 the letter that was received recently suggesting that there  
19 had not been a full meet and confer.

20 MR. NEUWIRTH: Your Honor, thank you for that  
21 question. If what counsel was saying is that it is willing to  
22 seriously consider -- and we can get into the back and forth  
23 on whether we were at an impasse or not. I'm not sure that's  
24 the best way to spend our time right now but if what counsel  
25 is saying is that it will seriously consider the proposal that

1 is in the third to last paragraph of my letter of Monday  
2 perhaps we don't need to waste the court's time and perhaps we  
3 should go forth and have that discussion and hopefully make  
4 some progress -- make some progress.

5 So we're happy to do that if counsel wants to do  
6 that in good faith and hopefully we'll make progress. If not,  
7 we too are prepared to talk about the issues today and submit  
8 on the papers that have already been submitted to the court.

9 THE COURT: Mr. Gilman, is plaintiff prepared to  
10 have those discussions in good faith based on that proposal?

11 MR. GILMAN: Your Honor, on behalf of myself and on  
12 behalf of my law firm we receive all requests in good faith  
13 and any time an adversary proposes something which is a  
14 compromise of a disputed position we will discuss it with our  
15 clients. We don't need to question whether I would do that or  
16 my firm would do that. Of course we will do that.

17 I'm not sure that that's going to get us where we  
18 need to be but as I've said I haven't had the time to talk  
19 with 26 holders. In the interim I will do so. I will report  
20 back to Mr. Neuwirth. We can jointly report back to the court  
21 as to whether or not, Your Honor, we need judicial  
22 intervention and if we do I gather that we're prepared to  
23 submit on the papers, on the letter briefs that were submitted  
24 to Magistrate Judge Francis.

25 THE COURT: In terms of talking to 26 holders my

1 understanding is there are two different counsel representing  
2 23 of those holders. So you only need to --

3 MR. GILMAN: And there's the third count. So all 26  
4 are represented and by that I mean, Your Honor, I have to  
5 speak with the people. I have to speak with the 26. I'm not  
6 going to be communicating directly with them. They have their  
7 own counsel. Their own counsel was on the meet and confer  
8 calls that Mr. Neuwirth was not on and we're prepared to  
9 pursue those discussions.

10 THE COURT: I just don't want to have a situation  
11 where there's the suggested numerosity of the subpoena parties  
12 somehow is going to make this drag out even further. My sense  
13 is that they are all aligned and also aligned with UMB in  
14 terms of their positions. So that it --

15 MR. GILMAN: Their positions are very, very clear.  
16 They joined in all the papers before Magistrate Judge Francis.  
17 We cite the ECF filings made on behalf of them directly by  
18 their own counsel. I have cautioned that I'm not sure we're  
19 going to get there because I don't know the next proposal will  
20 be acceptable but I'm not in the position of rejecting things  
21 before I discuss them with the relevant parties. I have to  
22 discuss it with the trustee and the counsel would have to  
23 discuss it with the 26 holders and get back to me. I think  
24 it's a matter of days or hours. It's not a matter of weeks.  
25 We're the ones who are trying to move this forward, this

1 entire case forward.

2 THE COURT: Why don't we set a one week period for  
3 general man -- and any other relevant counsel and parties to  
4 discuss and see if you can come to a resolution. If you do  
5 great, please let us know. And if you don't let us know that  
6 as well and --

7 MR. GILMAN: We'll jointly report to the court as it  
8 happens --

9 THE COURT: So one week from today is the 23rd.  
10 That's the day after Thanksgiving or is that Thanksgiving?

11 MR. GILMAN: Why don't we do it six days, not seven.

12 THE COURT: Perfect. Great. The 22nd.

13 MR. NEUWIRTH: Your Honor, is it your thought that  
14 if we do reach another impasse that we would have an  
15 opportunity to have argument or would you just take this issue  
16 on the papers at that point?

17 THE COURT: I have enough to go on papers but I do  
18 have a few questions related to it. So I might have you back  
19 to ask some of those questions.

20 MR. NEUWIRTH: Okay. We might welcome that, Your  
21 Honor.

22 THE COURT: So we're going to discuss two issues  
23 today then I think. Scheduling order, gentlemen. Five months  
24 of additional discovery, 4.5 months. It looks like overall  
25 until the end. Do I have that right approximately?

1           MR. GILMAN: It's their request for the extension,  
2 Your Honor, not mine.

3           THE COURT: My mistake. I thought it was joint.

4           MR. GILMAN: Well, no, it's a joint submission but  
5 they're the ones who have asked for time and we said if you  
6 have to have it, if you need it, we really don't want to give  
7 it to you but -- and we're trying to be cooperative. They  
8 asked for more time than this and we ended up with a joint  
9 submission that Your Honor has before you but we think this  
10 case is taking a long time.

11          THE COURT: So are you indifferent to whether  
12 there's an extension of a period less than five months or more  
13 than five months?

14          MR. GILMAN: I am indifferent as to whether it's  
15 less. I object to it being more.

16          THE COURT: Okay. Then, Mr. Neuwirth, please tell  
17 me why we need so much additional time.

18          MR. NEUWIRTH: Well, Your Honor, a lot of this is in  
19 the papers and I know you've seen some of it in the background  
20 of this case. This is an enormous case. Thankfully we have  
21 not been before the court on discovery disputes I think before  
22 the one that we're about to talk about today and I think  
23 that's attributed to the parties working together.

24                 There's a lot of who shot who as to why this case  
25 has taken some time. I'm not going to get into too much of



1 that because I don't think it's particularly relevant in the  
2 fact of a joint scheduling order that we've proposed to the  
3 court but Your Honor has asked so let me give you a little  
4 bit.

5           The complaint here has been amended several times.  
6 Most recently at the end of August of this year there was a  
7 new claim added for breach of our efforts to obtain what's  
8 called the production milestone. That claim literally was  
9 just filed two months ago. The parties have been negotiating  
10 the scope of appropriate discovery on that claim even before  
11 it was filed but certainly since and there is going to be a  
12 significant discovery volume attendant to that claim. That's  
13 one reason why we need more time.

14           In addition, Your Honor, the claims that pre-exist  
15 span an enormous amount of time, five years at a minimum on  
16 most of them, and the amount of documents that we have had to  
17 collect, search and produce is enormous. We have produced  
18 over 17 million pages of documents so far in this case. Over  
19 700,000 documents. The parties as we sit here today have  
20 agreed on approximately 70 custodians whose files need to be  
21 searched.

22           So not only do we have discovery with respect to the  
23 new claim, the production milestone claim that we are just  
24 beginning for all intents and purposes but there is a  
25 significant amount of documents that remain to be produced on

1 claims that pre-existed. Specifically, Count 2 of the  
2 complaint which is for breach of our efforts to reach product  
3 sales milestone number one.

4 The document production with respect to the approval  
5 milestone, Your Honor, which is Count 1 of the complaint,  
6 that's been substantially completed. So really as to Count 2  
7 discovery that requires the extension as well as the new  
8 claim, the production milestone claim.

9 On top of that, Your Honor, and this is the stuff I  
10 really would prefer not to get into but we can because again  
11 we have a jointly agreed scheduling order here, plaintiffs  
12 have been very, very aggressive and I understand that, about  
13 pushing for as much discovery as possible. They have sent 40  
14 letters perhaps to us pushing and pushing and pushing on more  
15 and more and more. So a lot of this delay we respectfully  
16 submit is of their own doing.

17 I hope that answers Your Honor's question at least a  
18 bit.

19 THE COURT: I agree with you. I don't want to get  
20 into he said/she said and I'm not at the moment worried about  
21 who caused what. I did want some understanding of what the  
22 history has been in terms of the discovery that has taken  
23 place. It does concern me that there have been millions and  
24 millions of pages of documents produced in any case. There  
25 will never be millions and millions of pages used in trial.

1 Of course it's always difficult to sift through and figure out  
2 what those are.

3 I would encourage the parties certainly to really  
4 try to focus on what's important and to streamline as much as  
5 possible. I'm really not one who likes to extend schedules.  
6 I can say that in my past career I have asked for those and  
7 for similar reasons. So I understand why the parties are  
8 asking what they are asking but I'd like to try to keep a  
9 little bit of a tighter reign on it.

10 We extended by three months for -- 4.5 -- if we  
11 extended that to three, could you make it work?

12 MR. NEUWIRTH: The answer is no, we can't.  
13 Plaintiffs know that.

14 THE COURT: Why not?

15 MR. NEUWIRTH: Because there's just too much that  
16 remains to be done. It just can't be done and we will be back  
17 in front of the court asking for more time and the court may  
18 say no but we're just not in a position to get it done in that  
19 amount of time particularly given the new claim.

20 But there's also an enormous amount left on Count 2.  
21 This is not an effort to delay, Your Honor. The burden here  
22 on us from the standpoint of what we are searching for, what  
23 we have to produce -- this is a global company with operations  
24 all over the world with documents relevant to this case all  
25 over the place. Plaintiffs want them all. It takes an

1 enormous amount of time.

2           Again, a lot of this I respectfully submit is of  
3 their own making. They have pushed and pushed and pushed and  
4 requested a ton of information and we are doing our best to  
5 provide all of that and I think we've done because we have not  
6 been in front of the court other than on the motion that we're  
7 about to talk about with respect to any real disputes. So  
8 we've agreed to give them what they have asked for. It takes  
9 time. We need that time. I know we do just based on the  
10 history of the case.

11           THE COURT: Can you be a little more specific about  
12 what that time is devoted to? Is it devoted to figuring out  
13 electronic systems? Presumably you've already done that. Is  
14 it talking to certain people? Is it getting the documents  
15 spit out of a database? What is it?

16           MR. NEUWIRTH: Well, Ms. Venezia could probably  
17 speak in a little more detail on these issues than I can but  
18 let me take a stab at it.

19           It's all of those things. We obviously do have our  
20 hands around a lot of the databases but there are continual  
21 requests for us to get our hands around even more. This is an  
22 enormous operation that Sanofi runs and so we've had letters  
23 as recently as days ago asking us to look at additional  
24 databases. It's additional custodian requests. There was a  
25 new custodian request last night that we got. So it's all of

1 those things. Then of course it's the gathering, review and  
2 production of those documents as quickly as possible.

3 Our request for five months and counsel knows this,  
4 we believe that is a stretch. I understand Your Honor is  
5 saying you don't like to extend schedules but as part of our  
6 negotiations we said to them five months is going to be  
7 incredibly difficult but we will agree to it to try to get to  
8 an agreed upon schedule.

9 So this is not sort of puffery or me trying to get  
10 more than I think we really need. This is what we need and  
11 that's going to be difficult.

12 MR. GILMAN: Your Honor, if I might --

13 THE COURT: Yes. Sure.

14 MR. GILMAN: -- correct the record. The newly added  
15 claim, the production milestone claim which in fact was filed  
16 at the end of August of this year was provided to them back in  
17 March with our discovery requests and it was at that time that  
18 we spoke with Judge Daniels about it and Judge Daniels said do  
19 it in the form of an amended complaint. They've had that  
20 complaint. They've had our discovery requests since March.  
21 It is a fact that it was filed on the docket in August but  
22 they have been working since March.

23 Number two, the tonnage of documents to which they  
24 refer are largely in bulk. The disassembly of their e-filing  
25 with the FDA. They have turned one e-filing into millions of

1 documents in order to be able to say to the court they have  
2 produced millions of documents. They had to do it twice  
3 because the first time they gave it to us it wasn't navigable  
4 just like it wasn't navigable the first time they gave it to  
5 the FDA and resulted in a rejection. They made what appears  
6 to be a comparable error in their production to us.

7           Your Honor, this is in fact a joint request because  
8 we got them to agree to what we got them to agree to but the  
9 reason this case is taking as long as it has is because  
10 they've had to do almost everything twice. They gave us a  
11 privilege log withholding thousands of documents. They do not  
12 comply with the local rules of this court. It does not comply  
13 with the custom and practice in this district. We had to  
14 write them letters on that. They then went back and did it  
15 again. That put us months behind the eight ball on the  
16 thousands of documents they're withholding.

17           We have then gone back to them and highlighted their  
18 privilege log. There are over 700 documents withheld solely  
19 on grounds of attorney-client privilege that were offered or  
20 sent to non client, non lawyer third parties. They do not  
21 invoke common interest doctrine. It cannot be invoked under  
22 New York Sanback [Ph.] decision by the Court of Appeals  
23 because they're not documents prepared in anticipation of  
24 litigation. There's no work product claim made with respect  
25 to any of this but they refused to produce them.

1           We have incipient discovery disputes but they had to  
2 make their productions twice, they had to give us privilege  
3 logs twice. What they're doing, they're doing incorrectly the  
4 first time. Months go by before we get to where they should  
5 have been on day one. Yes, they're agreeing to do things but  
6 agreeing and doing them are two entirely different things and  
7 we're not getting on a timely basis that which they have  
8 agreed to provide. We're getting it but we're getting it  
9 after letters and more letters and more reminders. Yes, we  
10 have written more letters in this case than in my experience  
11 generally occurs. But in this case we've had less cooperation  
12 than my experience generally occurs.

13           THE COURT: Mr. Neuwirth, I'm sure you have a very  
14 different view of the past. I don't think you need to counter  
15 what has been said and I'm not going into those issues right  
16 now.

17           I do have one fact question though and I had already  
18 been wondering the same thing because I did understand that a  
19 substantial portion of production were FDA filings. Outside  
20 of the FDA filings, MDA and whatever else goes along with it,  
21 how many documents have been produced putting all the FDA  
22 filings aside?

23           MS. VENEZIA: We've produced seven to eight million  
24 pages at least that are completely non FDA files, Your Honor,  
25 and with respect to the FDA files notwithstanding their

1 continued representations that the ten million pages were  
2 useless and garbage, there is substantive information in those  
3 ten million pages. Millions of pages of worth -- of  
4 information in that ten million that is not garbage. That is  
5 actually official FDA correspondence. It just happens to not  
6 purportedly be in the order in which they would like it. It  
7 is not like you can take the ten million and just toss it out  
8 the door respectfully, Your Honor.

9 THE COURT: Again, we're not going to -- we're not  
10 going to get into that. I just want to know the number and I  
11 think I have an idea of that.

12 I've heard enough. I'll give you the time. I don't  
13 -- hopefully won't be asked to do more with respect to that.  
14 I am concerned that given the size of the case and the scope  
15 of what you are dealing with that the time frames you've put  
16 together for the end are ones that will be tight and very  
17 tight related to expert discovery in particular. But this is  
18 the schedule you've put forth. I would like to hold you to it  
19 and I will go ahead and approve the proposed schedule and I  
20 will issue an order on that accordingly.

21 On the motion to compel with respect to the  
22 documents, I have a few questions but before I ask those is  
23 there anything either of you wanted to say in addition to the  
24 papers that you've submitted which I think I understand?

25 MR. GILMAN: Not on behalf of plaintiff, Your Honor.



1 MR. NEUWIRTH: No, Your Honor.

2 THE COURT: Let me go ahead with my questions then.  
3 For UMB, to what extent do the documents that you're  
4 seeking -- well what would you say as to why they're not  
5 duplicative of what you already have for what happened up  
6 through July 2016?

7 MR. GILMAN: Well, because by definition they're  
8 dealing with the subsequent time frame and in several respects  
9 are directly relevant and they are not duplicative of what we  
10 already have.

11 First, they will explain the resources, the efforts  
12 that Sanofi took after expiration of the time to meet  
13 milestones that resulted in substantial increased sales in one  
14 [inaudible]. After the due date passed they've ramped up  
15 sales. They've done that in some fashion. Because they've  
16 done it by definition they likely could have done it early and  
17 we'd like to understand why it wasn't done earlier, number  
18 one.

19 Number two, these documents not only speak to their  
20 contemporaneous presence as to what resources and plans there  
21 are and speak to the future as to what they're going to be  
22 doing, they also are retrospective in analyzing the  
23 [inaudible]. So this next period of time we will expect to  
24 see in these documents as we saw in the earlier documents a  
25 [inaudible] on what they did, how it worked, how they might

1 have done it better, what they might have done differently.  
2 That's relevant to whether or not they have taken "diligent  
3 efforts to achieve." That's the burden of the contract,  
4 diligent efforts to achieve the milestone.

5 THE COURT: I understand that argument. I believe  
6 you've identified 13 types of documents, what you call the  
7 core documents.

8 MR. GILMAN: Yes.

9 THE COURT: One question I have is how do you know  
10 all of those 13 types of documents contain the type of  
11 information that you're looking for?

12 MR. GILMAN: Because we have them already for the  
13 prior periods. These are regularly prepared. Every quarter  
14 or every year they prepare these and we have prior iterations  
15 so we know what they look like, we know what they're called,  
16 we know what they typically show. We can project what they're  
17 going to say in the next iteration. They're going to talk  
18 about what's gone on, what their plans for the future are,  
19 what they did in the past, it didn't work, it did work, what  
20 they might do differently.

21 All we're asking for is the next generation of  
22 documents that they produced to us without objection. They  
23 are four relevant documents. There is no burden raised and  
24 the only objection raised is that counsel agreed to a  
25 discovery cutoff of July 2016 and the fact is that there was

1 an interim agreement and the fact is within weeks of their  
2 initial productions of documents we said we needed this  
3 additional information.

4 THE COURT: But among the 13 documents some of them  
5 by name seem sort of self evident to me as to what date might  
6 contain the very high level. So are sort of opaque, F-1, F-2,  
7 F-3 for example, and one question I have related to what I  
8 just asked is to what degree are these documents duplicative  
9 among themselves because they contain the same information  
10 about what the sales have been during this time period, about  
11 the efforts that were made in the subsequent time period, et  
12 cetera.

13 MR. GILMAN: I'm not being clear. They will contain  
14 information about what the efforts are in this post July 2016  
15 period and my question is if those efforts were not done  
16 earlier why.

17 THE COURT: No, I understand the argument but again  
18 I'm just trying to understand if the documents that are being  
19 sought themselves are duplicative as to that. Like is there  
20 one document, like a retrospective -- a business plan that  
21 sets out what was done last year and what we're doing next  
22 year, in the next five years and why wouldn't that be enough.  
23 Why would you need the others?

24 MR. GILMAN: Your Honor, if there is one or a few of  
25 those documents which tell the entire story they don't have to

1 produce redundant information but we have seen in each of  
2 these documents something that has been helpful to us and  
3 clearly relevant to the claims and defenses in the case.

4 THE COURT: But among those that you've seen that  
5 are relevant, are they duplicative among themselves?

6 MR. GILMAN: No. Your Honor, I can't represent that  
7 they're entirely separate.

8 THE COURT: Sure.

9 MR. GILMAN: But for the most part they are not  
10 duplicative because they address these time frames in  
11 subsequent ways. One will be dealing with a budget. One will  
12 be dealing with a marketing plan within budgeted allowances.  
13 One will be dealing with something else, sales force, and some  
14 of them pull it together, some of them were very different and  
15 we need to have them all. But it's a very small collection of  
16 documents. It's not a search and you shall find. They know  
17 the cabinets that these things are in because they produced  
18 last year's versions.

19 THE COURT: One more question for you which is how  
20 long is the period to meet the first milestone from -- what  
21 length of time?

22 MR. GILMAN: The first milestone was March 31, 2014  
23 and, Your Honor, there is an issue with respect to that -- the  
24 calculation period which runs from something called produced  
25 launch or is it formed by product --

1           THE COURT: Regardless of what product launch  
2 date --

3           MR. GILMAN: We have a dispute about that.

4           THE COURT: I understand but regardless of when the  
5 product launch date is what is the subsequent period of time  
6 that the first milestone is supposed to be met?

7           MR. GILMAN: The definition of product launch  
8 affects --

9           MR. NEUWIRTH: When the end date is, Your Honor.

10          MR. GILMAN: -- when the end date is. That's the  
11 whole problem with the dispute because it moves the end date  
12 out [inaudible].

13          THE COURT: Exactly. So my question is what period  
14 of time is that from the launch to the end date for the  
15 milestone. Is it two years, is it one year, is it five years?

16          MR. GILMAN: Mr. Weiss will address this.

17          MR. WEISS: Thank you, Your Honor. So the CVR  
18 agreement has complex provisions in it. The best way to  
19 describe it is that there's a trigger date for product launch  
20 which sets up a sales measuring period. So as you move  
21 product launch date out further the dates upon which other  
22 launches are counted towards the end date are measured in a  
23 longer period of time.

24          To the extent there was agreement on the July 2016  
25 product launch date subsequently that's in dispute. If in

1 fact the plaintiff's theory of product launch --

2 MR. NEUWIRTH: I think you meant -- I don't mean to  
3 interrupt but I think you meant 14, Michael on product launch.

4 MS. VENEZIA: On product launch.

5 MR. WEISS: For product --

6 MR. NEUWIRTH: Just so you're clear, Your Honor.

7 MR. WEISS: Except that would push the end date out  
8 potentially into the end of 2016.

9 THE COURT: So it could be a period of over two  
10 years.

11 MR. WEISS: Yes.

12 THE COURT: Thank you. That helps.

13 Mr. Neuwirth, is there anything -- I do have some --  
14 I have a question or two for you possibly but do you have  
15 anything you want to respond to?

16 MR. NEUWIRTH: Well, sure, Your Honor. I'll try to  
17 be brief about it. Your Honor asked -- I think your first  
18 question to counsel was is any of this duplicative and  
19 obviously the argument that they've said that they would like  
20 to make with the benefit of this discovery is that Sanofi  
21 somehow ramped up its efforts after a [inaudible] time period  
22 for product sales. Milestone came and went and used more  
23 diligent efforts during that period than it did in the prior  
24 period once the milestone had passed.

25 THE COURT: It seems like a logical argument.

1           MR. NEUWIRTH: We understand the argument, Your  
2 Honor. But in order to -- the basis for that argument is  
3 really based on documents that they already have in our view.  
4 They point to in support of this very argument the increase in  
5 Lumtratta [Ph.] sales between the second quarter of 2015 and  
6 the second quarter of 2016. That entire time period, Your  
7 Honor, predates the current cutoff which is July 29, 2016. In  
8 fact, there's 30 days in addition in the current cutoff of  
9 cushion for plaintiffs. So they have those documents. It's  
10 upon that basis that they are making the argument that they're  
11 making which is that sales increased and that must mean that  
12 Sanofi devoted different efforts in the post product sales  
13 milestone one period than it did before.

14           THE COURT: Right. Again, it seems like a logical  
15 argument but if the -- let's say the launch period were as  
16 long as two and a half years, wouldn't it make sense that one  
17 would want to look at at least two and a half years of efforts  
18 made after July 2016 in order to compare what efforts were  
19 made during that time frame?

20           MR. NEUWIRTH: We understand that argument as well,  
21 Your Honor, and I think there are two answers to it. One is,  
22 just to be clear, in order to determine this issue of the  
23 disputed measuring period they have or will have all of the  
24 documents putting aside this dispute, all of the documents  
25 that they need in order to make that argument and I don't even

1 think they're saying that that they need to extend the period  
2 beyond the already agreed upon cutoff in order to make that  
3 argument.

4 THE COURT: I'm not addressing that particular  
5 argument.

6 MR. NEUWIRTH: Okay. Then the question becomes  
7 let's assume that they want to investigate or explore this  
8 longer period because they think that some day they may be  
9 able to establish that in fact that's the right period, what  
10 documents do they need in order to do that.

11 We had discussions, Your Honor, where there was a  
12 group of documents, and you can see this in our papers, a  
13 category of documents with marketing information, sales  
14 information, et cetera that would have covered and that we  
15 were willing to provide would have covered the period out  
16 until the end of December 2016.

17 Where things broke down, and I think that's where  
18 the core of this dispute really lies, is over long range  
19 projections, forecasts and things of that nature. That's what  
20 we thought was not relevant to what they want to do which is  
21 to essentially explore our efforts during what I'll call this  
22 stub period, the end of July 2016 to the end of December 2016.

23 THE COURT: I saw that in your papers but even a  
24 projection could be based on making a certain degree of  
25 efforts. You're going to project that you're going to double



1 your sales because you're going to double your efforts. Why  
2 wouldn't it be legitimate to or relevant to understand why  
3 more efforts are being made in that period?

4 MR. NEUWIRTH: I guess you can stretch any argument,  
5 Your Honor, and make -- try to make an argument with respect  
6 to relevance. We think the most relevant documents, and these  
7 were the documents that we were willing to provide, are the  
8 marketing sales resource type documents that they had  
9 requested and that's a different category. Those I understand  
10 if they were to have that information [inaudible] could be  
11 used to make an argument that there are different resources  
12 being devoted to efforts in the post period as opposed to the  
13 pre period.

14 Projections and forecasts though, and I understand  
15 what Your Honor is saying, I think is a different animal and  
16 much less relevant. That's really where we drew the line,  
17 Your Honor. There was a group which we're still going to  
18 provide of marketing and sales documents that the plaintiffs  
19 had asked for but when it comes to forecasts and budgets which  
20 are by their nature speculative that we think, Your Honor, is  
21 just a step too far.

22 This really goes back to when does the request for  
23 more discovery end. Obviously Your Honor knows that there was  
24 an agreed upon deadline for the cutoff of discovery in this  
25 case of July 29, 2016. That was a deadline. Plaintiffs now

1 want to move it. These are -- this is one of the reasons, one  
2 of the many reasons by the way why things have taken a long  
3 time in the case. There have been changes in theories and  
4 requests for additional documents and accommodations made and  
5 unfortunately we're here on this dispute. But at some point  
6 there has to be an end and there was a cutoff here.

7           We tried to compromise with them to provide the  
8 documents that we thought were most relevant with respect to  
9 the argument that they want to make with respect to this  
10 disputed stub period. We think the budgets is just a step too  
11 far in that regard.

12           THE COURT: It doesn't sound like you're arguing  
13 burden at least on these 13 specific documents, are you?

14           MR. NEUWIRTH: You know, Your Honor, Ms. Venezia  
15 will tell me that there really is a burden.

16           THE COURT: I'm sure every other additional document  
17 is a burden.

18           MR. NEUWIRTH: The answer is what they've asked for  
19 is core and regularly created documents. In a company like  
20 Sanofi what --

21           THE COURT: Let me pause there. I'm not addressing  
22 the any other. I'm asking the 13 specified.

23           MR. NEUWIRTH: Right. I think I understand the  
24 question. But with -- when you say you're not addressing any  
25 other --

1           THE COURT: Well, the idea is as -- I break down the  
2 request as to 13 specific documents that were identified and  
3 then any other so-called core documents. If you just looked  
4 at the 13 --

5           MR. NEUWIRTH: Yes.

6           THE COURT: -- is that a burden to get those?

7           MR. NEUWIRTH: I think the answer with respect to  
8 the 13 is that because of the global nature of the operations  
9 the answer is it is certainly a burden. There's not a file  
10 cabinet where they all get pulled out of, correct me if I'm  
11 wrong, but I think the opposite is true. So there is burden.  
12 There's no question about that. And that's why in our  
13 negotiations with counsel we were trying to come up with a  
14 limited pool of documents that we thought would aid them in  
15 exploring the argument that they want to make but does limit  
16 the burden on us. So there is burden, Your Honor. It's not a  
17 matter of just pulling open a drawer and giving them  
18 everything.

19           MR. GILMAN: Your Honor --

20           THE COURT: Wait, wait, wait.

21           MR. GILMAN: I'm sorry.

22           THE COURT: I just want to make sure that I didn't  
23 have another question for counsel which was going through my  
24 mind at the moment. Give me a second.

25                           [Pause in proceedings.]

1 THE COURT: Oh. Is there a protective order in this  
2 case?

3 MR. NEUWIRTH: A confidentiality order yes, there  
4 is.

5 THE COURT: I would think so. And how many tiers is  
6 it?

7 MS. VENEZIA: Two tiers, Your Honor.

8 THE COURT: So it has a -- so I assume that one of  
9 those tiers is to -- is attorney's eyes only, would that be  
10 correct?

11 MS. VENEZIA: The equivalent. Highly confidential.

12 THE COURT: Is that --

13 MS. VENEZIA: Similar to attorney's eyes only.

14 THE COURT: Does that include in-house counsel or  
15 outside counsel only?

16 MS. VENEZIA: Also includes in-house counsel. I  
17 believe that is correct.

18 THE COURT: Sir, you wish to address.

19 MR. GILMAN: Budgets by definition are a statement  
20 of intended effort, diligent efforts is informed by Sanofi's  
21 statements of what efforts they intend to make, number one.

22 Number two, forecasts are not in my experience in  
23 the case of SEC registrants and sophisticated companies --  
24 we're dealing here with one of the world's largest [inaudible]  
25 companies done by the seat of their pants. There are bases

1 and reasons and [inaudible] that go into forecasts. We're not  
2 asking for all the underlying information but I don't -- I  
3 don't take it that forecasts are meaningless because they're  
4 just forecasts. We think budgets and forecasts are directly  
5 relevant.

6 With respect to burden, these are all electronic  
7 documents. They can find them very, very quickly.

8 THE COURT: Are they -- let me ask you are they --

9 MR. GILMAN: They produced them in electronic form  
10 earlier.

11 THE COURT: But are they single documents for all of  
12 Sanofi or are they documents that are created by each  
13 individual unit in each country? What's -- when I say 13  
14 documents I'm thinking literally 13 documents. To what extent  
15 is it beyond that?

16 MR. GILMAN: They are --

17 MS. VENEZIA: Your Honor --

18 MR. GILMAN: They are [inaudible] Sanofi only.  
19 We're not dealing with around the [inaudible] offices but  
20 they're [inaudible]. We're talking about the comparable  
21 documents.

22 THE COURT: Let me ask defendants that question.

23 MS. VENEZIA: There are top level documents at the  
24 end of the day. They are -- the process begins unit by unit  
25 across the globe within different countries and within

1 different units and then they ultimately get consolidated up  
2 and there's a process for which that occurs.

3 MR. NEUWIRTH: Your Honor, there's one additional  
4 issue if we're focusing on the projections and the budgets  
5 that I think plaintiff request runs smack into, and that's the  
6 prior rulings in this case. The time period that plaintiffs  
7 are seeking the production of documents for is a time period  
8 which gets into additional product sales milestones that are  
9 set forth in the CBR agreement and Your Honor probably saw  
10 some of this in the letters and correspondence. Those are  
11 product sales milestones 2, 3 and 4.

12 There was a motion to dismiss at the beginning of  
13 this case where Judge Daniels made it clear that there are no  
14 claims with respect to 2, 3 and 4 in this case and as we have  
15 set forth in our papers there have been several efforts since  
16 that motion to dismiss ruling to resubmit -- reinsert 2, 3 and  
17 4 issues into the case notwithstanding that motion to dismiss  
18 ruling.

19 I understand counsel's argument that they are  
20 seeking this information in order to try to compare our  
21 efforts from one period to another but the fact remains that  
22 the discovery they are seeking deals with a time period that  
23 at least with respect to claims 2, 3 and 4 Judge Daniels has  
24 said is off limits.

25 We tried to compromise with them given our concern

1 about that issue by offering them a set of documents that we  
2 thought would be sufficient for them to make the argument that  
3 they want to make. That obviously didn't work and that's why  
4 I think we're arguing at the end of the day about budgets,  
5 forecasts, et cetera, but those type of documents are directly  
6 relevant to the issue of whether product sales milestones 2, 3  
7 and 4 will be made and those issues are not issues in this  
8 case pursuant to Judge Daniels prior rulings.

9 MR. GILMAN: Your Honor, Judge Daniels spoke  
10 directly to this issue at Page 30 of the August 17, 2016  
11 transcript at ECF 77. It's quoted in Footnote No. 2 of our  
12 reply brief on this motion.

13 The fact, the fact that a document may be relevant  
14 to Count 2 which is live and in this case and also relevant to  
15 claims which the judge dismissed without prejudice as  
16 premature doesn't mean that we can't get the document for  
17 Count 2.

18 MR. NEUWIRTH: Your Honor, the question is -- the  
19 question --

20 THE COURT: Let's make these final comments, please.

21 MR. NEUWIRTH: Yes, sure. We're well aware of Judge  
22 Daniels comment with respect to what discovery may be  
23 appropriate and the question is what discovery may be  
24 appropriate and what's the limit to it. We think we came up  
25 with a core set of documents as I have said that would have

1 satisfied their desire to make the comparison argument they  
2 want to make. We think the budget forecast arguments go too  
3 far and weigh too far into the issues that are not issues in  
4 this case.

5 THE COURT: All right. I think I have enough to  
6 make a ruling. Let me take a minute chambers. I'll be back  
7 in chambers and I will come out in two minutes.

8 THE CLERK: All rise.

9 [Off the record.]

10 THE COURT: You may be seated. I am prepared to  
11 rule on this particular motion. UMB is a trustee of parties  
12 holding contingent rights in Sanofi's development of the  
13 multiple sclerosis drug. UMB asserts breach of contract with  
14 Sanofi based on Sanofi's alleged failure to use diligent  
15 efforts to meet sales milestone targets for the drug that  
16 would trigger substantial payments if those milestones were  
17 met. Sanofi has not asserted any counterclaims but has  
18 alleged various defenses.

19 The issue that I am addressing today concerns a  
20 motion to compel for production of documents from Sanofi.  
21 I've considered all the papers and argument here today. My  
22 ruling will be as follows.

23 The defendant Sanofi will be required to produce 13  
24 specifically identified documents in counsel's letter of May  
25 3, 2017 for beyond July 2016. However, they need only produce



1 the versions that are final and which are consolidated.

2           Secondly, they may redact at their choosing  
3 projections that go beyond a two and a half year period from  
4 June 2016 which means they should not redact information that  
5 runs through 2019 but may redact information or projections  
6 beyond that point if they feel they think that's desirable or  
7 necessary. The two and a half year period I'm setting  
8 corresponds, I understand, to what the outside time frame  
9 would be for the first milestone to be met.

10           Let me give you a couple justifications and  
11 explanations. UMB argues that these documents are relevant  
12 for the following reasons. I'm sorry. Strike that statement.  
13 We'll get to that.

14           Under Rule 26 parties may obtain discovery regarding  
15 any non privileged matter that is relevant to any party's  
16 claim or defense and proportional to the needs of the case.  
17 The court agrees with UMB that documents post dating the time  
18 period at issue may contain relevant data because they may  
19 provide retrospective analysis of earlier efforts and also  
20 because efforts taken during subsequent milestone periods can  
21 serve as a point of comparison to efforts taken during the  
22 first milestone period. That information is likely to be an  
23 important determinant of whether or not Sanofi exercised  
24 diligent efforts for the first milestone period.

25           Further, post first milestone information generated

1 during 2017 is no less relevant than the same type of  
2 information generated for the last half of 2016. A 2017  
3 business analysis likely will address efforts undertaken  
4 during 2016 including for the first half of that year.

5 Similarly, efforts undertaken by Sanofi during 2017  
6 may well serve as a benchmark against which to measure efforts  
7 made during 2016 as an example. Of course Sanofi is free to  
8 counter such arguments with evidence of factors that may  
9 explain differences in sales having little or nothing to do  
10 with the efforts Sanofi made to promote and sell the drug.

11 Sanofi's end run argument doesn't hold up. If  
12 documents are relevant to claims for the first milestone the  
13 fact that they may also be relevant to subsequent milestones  
14 does not mean the documents should not be produced even if  
15 those claims are not in the case.

16 Accordingly, the court finds that the specific so-  
17 called core materials identified in the letter of May 3rd are  
18 relevant and proportional to the needs of the case, that means  
19 the parties and other factors. Accordingly, Sanofi is  
20 directed to produce the documents as I outlined them at the  
21 beginning.

22 At the same time discovery should be proportional  
23 and it should not evolve into a fishing expedition. So I'm  
24 denying the motion to compel to the extent it seeks any other  
25 regularly created Sanofi core budget marketing and sales

1 documents as generally stated in the motion. That is the  
2 court's ruling. Thank you.

3 MR. NEUWIRTH: Your Honor, may I ask one clarifying  
4 question?

5 THE COURT: You may.

6 MR. NEUWIRTH: With respect to the portion of Your  
7 Honor's ruling about redacting projections beyond the two and  
8 a half year period if I understood it correctly, I think the  
9 thought there was that you wanted to give plaintiffs the  
10 ability to get those projections through the duration of the  
11 disputed measuring period. No?

12 THE COURT: No. A period of time that will mirror  
13 the period of time -- the outside period of time by which the  
14 first milestone could be or could or should have been met. In  
15 other words, if it's a one year period from launch to when the  
16 first milestone was supposed to be met I'm giving them one  
17 year of time beyond that. Here I understand approximately  
18 there was a two and a half year period that would be the  
19 outside time period from launch to meeting the first  
20 milestone.

21 Accordingly, I am trying to mirror that with the two  
22 and a half years on the other side of the first milestone  
23 target date.

24 MR. NEUWIRTH: I think what they're saying, but  
25 they'll correct me if I'm wrong, is that the last date by

1 which product sales milestone could have been met may have  
2 been the end of December 2016 based on a product launch which  
3 they think is in dispute.

4 THE COURT: But a product launch that is in dispute  
5 but which took place as early as what?

6 MS. VENEZIA: Sanofi's positoin is that product  
7 launch occurred on April 1, 2014. It is my understanding,  
8 Your Honor, that plaintiffs posited that product launch could  
9 have taken place as early -- I'm sorry, as late as January  
10 2015 which is a difference of six months which is why the tail  
11 end of product sales measuring period number one, the period  
12 that is in dispute we have said the date to meet that was June  
13 30, 2016. Plaintiffs have posited that it could be as late as  
14 December 31, 2016. So that's only a difference at the end of  
15 the day of six months on the back end.

16 MR. NEUWIRTH: So my question --

17 THE COURT: We're talking over each other or by each  
18 other. What is the longest period of time based on the  
19 disputes you're having about launch date, what is the longest  
20 period of time that could be between a launch date and meeting  
21 the first milestone?

22 MS. VENEZIA: Approximately -- it's approximately  
23 two years, Your Honor.

24 THE COURT: That's what I thought. My ruling stands  
25 as is. So ordered. Thank you.

1 MR. NEUWIRTH: Thank you, Your Honor.

2 MR. GILMAN: Thank you, Your Honor.

3 THE COURT: Oh, any -- I didn't say we stand  
4 adjourned even though I stood.

5 A couple of things. First of all, I'd like to set a  
6 date for a status report from you jointly so that I can get an  
7 idea of how things are moving along. I'd like to set that for  
8 45 days from today. Obviously if you have any issues you want  
9 to bring to the court's attention before then you may. I hope  
10 to hear that things are going swimmingly.

11 Anything else from either side that we need to  
12 address?

13 Okay. Now we stand adjourned.

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1 I certify that the foregoing is a court transcript from  
2 an electronic sound recording of the proceedings in the above-  
3 entitled matter.

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6 Shari Riemer, CET-805

7 Dated: November 17, 2017  
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